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IN THE

Supreme Court of the United States

October Term 1972

No. 72-367

MARK P. ESSLING, a minor, and EDWARD J. ESSLING, a minor, by JAMES ESSLING, their father and natural guardian,

Petitioners,

vs.

RICHARD L. BRUBACHER, Commissioner of Administration of Minnesota,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term 1972

No. _____

MARK P. ESSLING, a minor, and EDWARD J. ESSLING, a minor, by JAMES ESSLING, their father and natural guardian,

Petitioners,

vs.

RICHARD L. BRUBACHER, Commissioner of Administration of Minnesota,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, Mark P. Essling, a minor, and Edward J. Essling, a minor, by James Essling, their father and natural guardian, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on June 8, 1972.

OPINIONS BELOW

The per curiam opinion of the Court of Appeals, dated June 8, 1972, is unreported and is attached hereto. (A. 2, 3, 4, Exh. "A"). The memorandum opinion of the United States District Court for the District of Minnesota, Third Division, is unreported and is attached hereto (A. 6, 7, Exh. "B").

JURISDICTION

The judgment of the Court of Appeals was entered on June 8, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254; 28 U.S.C. 2106 and 28 U.S.C. 1331.

QUESTION PRESENTED

Whether there is Federal "subject matter jurisdiction" under 28 U.S.C. Sec. 1331 where plaintiffs' complaint is predicated on the claim that defendant, a state official acting under a state law, is attempting to dispose of School Trust Fund lands for less than their value in violation of a trust created by the Federal-State Land Grant Compact?

STATUTORY PROVISIONS INVOLVED

This petition involves the Acts of Congress and portions of the Constitution of Minnesota creating the trust for school lands in the Federal-State (Minnesota) Land Grant Compact as follows:

The Act of Congress of July 13, 1787, U. S. Rev. Stat. 2nd Ed. 1878, p. 13, Art. III;

The Act of Congress of March 3, 1849, 9 U. S. Stat. at Large 403, Sec. 18;

The Act of Congress of February 26, 1857, 11 U. S. Stat. at Large 166, Sec. 5;

The Act of Congress of May 11, 1858, 11 U. S. Stat. at Large 285;

Constitution of Minnesota, Article II, Sec. 3; Article VIII, Sections 1, 2 and 3.

This petition also involves provisions of Federal and State laws relating to the acquisition and disposition of Minnesota School Trust Lands as follows:

The Act of Congress of January 8, 1971, Public Law No. 91-661, 84 Stat. 1970; Sec. 101;

Laws of Minnesota 1971, Regular Session Chapter 852, Sec. 3 (2), Sec. 8, Sec. 9; M.S.A. 84B.03(2), M.S.A. 84B.08, M.S.A. 84B.09.

Other Federal Statutory provisions involved are 28 U.S.C. 1254, 28 U.S.C. 2106 and 28 U.S.C. 1331.

The pertinent text of the above laws are set forth in the appendix here.

STATEMENT OF THE CASE

1. Background: Federal-State Compact

Congress, in 1849, passed the Minnesota Organic Act creating the Territorial Government of Minnesota, 9 U.S. Stat. 403 (1849). This Act provided that specific lands would be reserved for schools. (A. 8).

In 1857, Congress passed the Minnesota Enabling Act, allowing the people of the territory to form a Constitution and State Government "preparatory to their admission into the Union", 11 U. S. Stat. 166 (1857). The Enabling Act required

compliance with certain mandatory conditions prior to admission to the Union and offered some propositions which the people of Minnesota were free to accept or reject. One of the latter propositions concerned the previously reserved school lands. The Enabling Act offered to grant the lands to Minnesota if the State would use them for schools (A. 9).

The people of Minnesota voted to become a State and proposed a Constitution accepting the offers of the Enabling Act, Minnesota Constitution Article 2, Section 3 (A. 9, 10). The proposed Constitution specifically provided that the school lands would never be sold "otherwise than at public sale" and that the proceeds of any such sale would be paid into a "perpetual school fund" which would "forever be preserved inviolate and undiminished", Minnesota Constitution Article 8, Sec. 2 (A. 10, 11).

In 1858, Congress passed the Minnesota Admission Act, which admitted Minnesota, under its Constitution, to the Union, 11 U. S. Stat. 285 (1858). (A. 11).

This Federal-State Compact and the trust arising thereunder is still operative. Proceeds from the sale and lease of school lands have accumulated and today the trust fund has a principal of approximately 450 million dollars. (A. 16). Furthermore, much of the original trust lands have not yet been sold or leased.

2. The Proposed Disposition of School Trust Lands

Two recent Acts, one Federal and one State, attempt to create a park in northern Minnesota. This proposed park is to include substantial acreages of the lands held under the trust of the Federal-State Land Grant Compact. (A. 14, 15).

The Federal Act provides for the establishment of the park after all lands in the area held by the State of Minnesota are *donated* for the park. Public Law No. 71-661, Sec. 101 (Jan. 8, 1971). (A. 12).

The Minnesota Act attempts to *donate* the School Trust Lands to the park. In an effort to satisfy the requirements of the trust in the Federal-State Land Grant Compact, it provides for a form of condemnation of the School Trust Lands involved, Chap. 852 Minn. Sess. Law Serv. (1971) Sec. 3(2); M.S.A. 84B.03(2), (A. 12). However, this State Act predetermines the outcome of such proceedings by legislatively fixing a specified and absolute dollar limitation on the amount to be paid to the School Trust Fund for the trust lands, Chap. 852 Minn. Sess. Law Serv. (1971), Sec. 9 (A. 12,13). Likewise, it fails to identify the parties to such proceeding or to provide for any representation for the School Trust Fund, Chap. 852 Minn. Sess. Law Serv. (1971) Sec. 3 (2); M.S.A. 84B.03(2). (A. 12).

3. Present Action

Plaintiff schoolchildren, as primary beneficiaries of the school trust, assert jurisdiction under the laws of the United States and bring this action in their own behalf and for all of the schoolchildren of Minnesota. (A. 14). They allege that the Compact requires the School Trust be secured in payment of judicially determined full value for the disposition of School Lands (A. 15, 16). The value of the school land in the proposed park area, they assert, grossly exceeds the limited amount provided in the State Act. (A. 15). They contend that such limitation in amount of compensation and the procedural insufficiencies of the State Act contravene the requirements of

the Compact and the beneficiaries of the Compact will be deprived of the full benefit of the grant. (A. 16, 17).

The defendant, by his motion to dismiss, admits these allegations. Plaintiffs seek a Declaratory Judgment that the State Act contravenes the trust provisions of the Compact. They seek to enjoin the defendant from acquiring the school trust lands under the provisions of the State Act. (A. 17, 18).

4. Proceedings in the Courts Below

After plaintiffs' Complaint was served, defendant moved to dismiss the action on the ground, among others, that the Court lacked subject matter jurisdiction because the complaint did not show a controversy arising under a law of the United States.

The District Court for the District of Minnesota dismissed the complaint for lack of subject matter jurisdiction (A. 2, 3, 4). A Judgment of Dismissal was entered pursuant to that order on November 12, 1971.

On December 3, 1971, plaintiffs filed a Notice of Appeal to the United States Court of Appeals for the Eighth Circuit. On June 8, 1972, the Court of Appeals filed its Judgment affirming the District Court. (A. 5).

REASONS FOR GRANTING THE WRIT

(a) The Eighth Circuit Court of Appeals has rendered a decision in conflict with the decisions of other Courts of Appeal on the same matters.

(b) The Eighth Circuit Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court.

ARGUMENT

In this case, the District Court dismissed the complaint for the reason that "the Court lacks subject matter jurisdiction". The Court of Appeals affirmed on the basis of the District Court's opinion. The question here is whether the complaint sets forth a controversy arising under federal law.

(1) Preliminary Discussion

A complaint which bases its claim directly on federal laws presents a federal question, *Bell v. Hood*, 327 U. S. 678, 66 S. Ct. 773 (1946); *The Fair v. Kohler Die & Specialty Co.*, 228 U. S. 22, 33 S. Ct. 410 (1913); *McGoon v. Northern Pacific Railway Co.*, 204 F. 998 (D.C. N.D. 1913); *Mishkin, The Federal "Question" in the District Courts*, 53 Col. Law Rev. 157 (1953).

The complaint here asserts a claim based on the Enabling Act and the Admission Act. Those federal laws, with sections of the Minnesota Constitution, are integral and inseparable parts of the Federal-State (Minnesota) Land Grant Compact. In those circumstances, the federal aspects raise a federal question, *Smith v. Kansas City Title and Trust*, 255 U. S. 180, 41 S. Ct. 243 (1921); *Hart and Wechsler, The Federal Courts and the Federal System* (1953) 766.

(2) Conflict With Other Courts of Appeal

The conflict exists in three dimensions, (a) the lower Court here declined to recognize the Federal-State Land Grant Compact as a law of significant federal interest, (b) the lower Court here declined to follow the Federal Policy of Judicial protection of the School lands trusts, (c) the lower Court

failed to consider or overlooked the long established doctrine that the measure of "Just Compensation" in condemnation is a matter of Judicial and not Legislative decision.

(a) Federal-State Land Grant Compact:

The recognition of the Compact as a federal law of significance is basic to "subject matter jurisdiction". The failure to recognize this is not only in conflict with other Courts of Appeal, but contrary to every known case considering the matter.

The Ninth Circuit Court of Appeals in U. S. v. 111.2 Acres of Land, 435 F. 2d 561 (1970), considered the Federal-State Land Grant Compact. If there unanimously affirmed and adopted the scholarly opinion of Chief Judge Powell of the District Court, 293 F. Supp. 1042 (E. D. Wash. 1968). In that opinion, it was said,

> *"II The Enabling Act*
>
> Section 10 of the Enabling Act is a legislative grant to the States," 293 F. Supp. 1044.
>
> *"IV Law and Compact*
>
> A legislative grant is both compact (or contract) and law," 293 F. Supp. 1048.
>
> Section 10 of the Enabling Act and Art. XVI of the Washington Constitution constitute a declaration of trust . . . The equitable interest of the public school system, the cestui que trust, has been interposed between the United States (grantor) and the State (trustee) . . . *This trust is real, not illusory.* A donation to the United States under (Wash. Statute) would constitute a breach of trust which the Court will not countenance." 293 F. Supp. n. 6, 1049. (Emphasis added.)

Other cases holding that an Enabling Act, State Constitution and Admission Act, constitute a Federal-State Compact, trust agreement and law are *U.S. v. Ervien, Cm'r of Public Land of New Mexico*, 246 Fed. 277 (8th Cir. 1917) aff'd 251 U.S. 41, 40 S. Ct. 75 (1919) (State cannot divert 3 cents of each dollar derived from sale of School Trust Lands—all compensation must be paid to School Trust); *Lassen v. Arizona*, 385 U.S. 458, 87 S. Ct. 584 (1967) (a certiorari proceeding in this Court—State cannot acquire a right of way over School Trust Lands without payment of full compensation and cannot set off any enhancement or benefit); *U.S. v. Fenton*, 27 F. Supp. 816 (D.C. Idaho 1939). (Trustee of school lands has priority on mortgages on school land because of Federal-State Compact); *Murtaugh v. Chicago M. and St. P. Ry. Co.*, 102 Minn. 52, 112 N.W. 860 (1907) (to allow private party to acquire title to school lands by adverse possession would contravene Federal-State Trust); *State v. Central Nebraska Power Irr. Dist.*, 143 Neb. 153, 8 N.W. 2d 841 (1943); *State v. Brian*, 84 Neb. 30, 120 N.W. 916 (1909).

(b) Conflict With Federal Judicial Policy

The Ninth Circuit Court of Appeals in its unanimous affirmance and adoption of Judge Powell's opinion in *U.S. v. 111.2 Acres of Land*, supra, acknowledged the Federal Judicial Policy of extending protection to the School Lands Trusts. The Court said,

> "This construction accords with a policy favoring Judicial protection of the school lands trusts." (293 F. Supp. 1047 n. 3), and
>
> "There has been a history of unauthorized diversion by the States of school land and proceeds. . . . Therefore it

has fallen to the Courts to protect the trust corpus and assure that it is devoted solely to support the common schools. . . . A recent example of judicial protection of school land trusts is Lassen v. Arizona, 385 U.S. 458, 87 S. Ct. 584, 17 L. Ed. 2d 515 (1967). . . . The Court rejected this contention (of U.S.) to insure maximum support of the trust." (293 S. Supp. 1047, n. 2).

(c) Conflict on Just Compensation

The lower Court here failed to acknowledge the most basic rule in the determination of "just compensation". That rule is that such compensation must be first adequately secured and the amount thereof is a judicial and not a legislative matter. Here the State Act of the legislature fixes a specific and absolute maximum amount to be paid for the school trust lands, Chap. 852, Minn. Sess. Law Serv. (1971) Sec. 9, M.S.A. 84B.09 (A. 12, 13).

The decision in *Rockaway Pacific Corp. v. Stotesbury, et al.*, 255 F. 345 (N.D. N.Y. 1917—3 Judge Court) held such a statute void in that just compensation was not first secured and that the amount of compensation was a judicial and not a legislative question. See also *Monongahela Nav. Co. v. U.S.*, 148 U.S. 312, 13 S. Ct. 622, at 626 where this Court said,

> "By this legislation congress seems to have assumed the right to determine what shall be the measure of compensation. *But this is a judicial and not a legislative question.*" (Emphasis added.)

Other cases to the same effect are *Keystone Associates v. Moerdler*, 19 N.Y. 2d 78, 224 N.E. 2d 700 (1966); *State v. McCook*, 109 Conn. 621, 147 A. 126 (1929); *Godfrey v. District*

Court, 44 Minn. 299, 46 N.W. 355 (1890). In *Keystone*, supra, the Court said,

> ". . . the determination of just compensation is a judicial function and . . . the legislature cannot set the maximum figure in the amount of compensation that will be paid." 224 N.E. 2d 703.

(3) Conflict With Applicable Decisions of This Court

The decision here below is in conflict with the holdings of this Court in *Bell v. Hood*, supra, and *The Fair v. Kohler Die & Specialty Co.*, supra. Those decisions make it clear that where a complaint bases its claim directly on a federal law, a federal question is presented. Here, as stated, the claim is based on the Enabling Act and the Admission Act.

The fact that those federal laws comprising the Federal-State Compact do not expressly create a cause of action is not determinative. The holding below is in conflict with *J. I. Case Company v. Borak*, 377 U.S. 426, 84 S. Ct. 1555 (1964); *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210, 65 S. Ct. 235 (1944); and see *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 430 U.S. 388, 91 S. Ct. 1999 at 2008 n. 11 (Opinion of Mr. Justice Harlan). See also *Reitmeister v. Reitmeister*, 162 F. 2d (2nd Cir. 1947). In those cases, this Court has recognized that a right of action may be inferred from federal statutes. In *Lassen v. Arizona*, supra, the Enabling Act involved specifically made it the duty of the Attorney General to enforce the provisions of that Compact. It is to be noted in that regard, the last clause therein read,

> "Nothing herein contained shall be taken as in limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act," 87 S. Ct. 592.

It is reasonable to infer therefrom that a right to enforce existed in a citizen by implication.

In *U.S. v. Ervien, Cm'r of Public Lands of New Mexico*, supra, and in *Lassen v. Arizona*, supra, this court has recognized the significance and the federal interest in the Federal-State Land Grant Compacts. The failure of the lower Courts to do so here is a direct conflict. In addition, in *Lassen*, supra, (87 S. Ct. 585, n. 3) this Court observed that between 1803 and 1962, the United States granted a total of 78,000,000 acres of land to all the states in support of the common schools, and stated,

> "We brought this case here because of the importance of the issues presented both to the United States and to the States which have received such lands." 87 S. Ct. 586.

CONCLUSION

For the reasons stated, petitioners respectfully pray that this Court grant the Petition for Certiorari to the Eighth Circuit Court of Appeals.

Respectfully submitted,

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Of Counsel

APPENDIX

DOCKET ENTRIES—DISTRICT COURT

8- 6-71—Filed Complaint.

Issued Summons.

Case assigned to J. Devitt, per card No. 217.

8-18-71—Filed summons, returned served 8-11-71.

9- 7-71—Filed Deft's Notice of Motion and Motion To Dismiss Complaint. Noticed for hearing 9-20-71 at 9 A.M. or as soon thereafter as counsel can be heard. Memorandum of Points and Authorities attached. Aff. of Serv. by Mail 8-31-71 attached.

10- 4-71—Entered Record of Hearing on Defendant's Motion to Dismiss complaint; Argued, taken under advisement. Plaintiff to submit briefs within 20 days and defendant in 7 days thereafter. (Devitt-J.; Lindberg-reporter)

11-12-71—Filed and entered Memorandum and Order dismissing this action for lack of jurisdiction (Devitt-J)

Filed and entered judgment pursuant to the foregoing order.

Mailed conformed copies of the foregoing order to counsel for the respective parties.

12- 3-71—Filed plaintiffs' notice of appeal.

Filed bond on appeal.

Mailed copy of notice of appeal to Attorney General, State of Minnesota, State Capitol, St. Paul, Minn. 55101, and to Wayne H. Olson, 414 Roanoke Bldg., Mpls., Minn. 55402.

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

MARK P. ESSLING, a minor, and EDWARD J. ESSLING, a minor, by JAMES ESSLING, their father and natural guardian,

Plaintiffs,

vs.

RICHARD L. BRUBACHER, Commissioner of Administration of Minnesota,

Defendant.

3-71-Civ-201

MEMORANDUM & ORDER

David Essling, St. Paul, Minnesota, attorney for plaintiffs. Warren Spannaus, Attorney General of Minnesota and Wayne H. Olson, Special Counsel, Minneapolis, Minnesota, attorneys for defendant.

This is an action brought on behalf of two minor children who are citizens and residents of the United States and of the State of Minnesota and students in the public schools of the state and on behalf of 930,000 public school children of Minnesota similarly situated.[1] Plaintiffs seek a declaration that the acts of defendant, in allegedly attempting to effect a donation and gift of "school trust lands" to the United States for use in the proposed Voyageurs National Park constitute a breach of the trust agreement between the United States and

[1] Defendant is the Commissioner of Administration for the State of Minnesota and is charged with authority to acquire and possess the lands in question.

the State of Minnesota and a violation of specific statutes of the United States.[2]

Defendant has moved to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure on the grounds that the court lacks subject matter jurisdiction.[3]

It is well settled that the jurisdiction of a federal court must be made to appear affirmatively, *Scroggin Farms Corp. v. McFadden*, 165 F. 2d 10 (8th Cir. 1948), and where the jurisdiction is challenged, plaintiff has the burden of proving its existence. *Gibbs v. Buck*, 307 U.S. 66, 59 S. Ct. 725 (1939); *Reese v. Holm*, 31 F. Supp. 435 (D. Minn. 1950). Plaintiffs here have failed to meet this burden.

In order for jurisdiction to be properly based on the existence of a "federal question" that question must constitute an essential element of plaintiff's cause of action and form an integral part of his case. *Shulthis v. McDougal*, 225 U.S. 561, 32 S. Ct. 704 (1912); *Cogswell v. Board of Levee Comr's*, 142 F. 2d 750 (5th Cir. 1944). The question must be real and substantial and not conjectural. *Koll v. Wayzata State Bank*, 397 F. 2d 124 (8th Cir. 1968). It is not enough that the question of federal law be merely lurking in the background. *Stanturf v. Sipes*, 335 F. 2d 224 (8th Cir. 1964), *cert. denied*, 379 U.S.

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[2] The specific statutes plaintiff uses as his basis for asserting jurisdiction include the Minnesota Organic Act, 9 U.S. Stat. 403 (1849), the Minnesota Enabling Act, 11 U.S. Stat. 166 (1857), and the Minnesota Admission Act, 11 U.S. Stat. 285 (1858).

[3] Plaintiff seeks to predicate jurisdiction upon 28 U.S.C. §1331 which provides, "The district courts shall have original jurisdiction of all civil actions . . . and arising under the Constitution, laws, or treaties of the United States." Defendant urges that the complaint also fails to show the existence of an actual controversy between the parties, that the plaintiff has no capacity to sue, and that the action is premature. In light of the determination that the court lacks subject matter jurisdiction, it is not necessary to reach a decision on these issues.

977, 85 S. C. 676 (1965); *Martin v. Graybar Electric Co.*, 285 F. 2d 619 (7th Cir. 1961).

The plaintiffs have not shown the presence of a substantive right or legal interest derived from federal law. See *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, —— U.S. ——, 91 S. Ct. 1999 (1971), (Opinion of Mr. Justice Harlan). Here it cannot be said that the right of plaintiffs to recover depends on the construction to be given the Constitution or laws of the United States. *Wheeldin v. Wheeler*, 373 U.S. 647, 83 S. Ct. 1441 (1963); *Bell v. Hood*, 327 U.S. 678, 66 S. Ct. 773 (1946). The case upon which plaintiffs most heavily rely, *Lassen v. Arizona*, 385 U.S. 492, 87 S. Ct. 584 (1967) does not provide authority in support of the jurisdiction claims.[4]

DEFENDANT'S MOTION to dismiss the action for lack of subject matter jurisdiction is granted.[5]

Dated: November 12, 1971.

EDWARD J. DEVITT
Chief Judge
United States District Court

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[4] *Lassen* was commenced as an original proceeding before the Arizona Supreme Court, not in the federal courts. In granting certiorari to review the decision, the Court stated, "We brought this action here because of the importance of the issues presented both to the United States and to the States . . ." *Lassen*, at 586. A further distinction is possible. Unlike the Minnesota Enabling Act, the enabling act involved in *Lassen* contained detailed provisions as to the manner of disposal of the trust lands and expressly required the Attorney General of the U.S. to maintain whatever proceedings might be necessary to enforce its terms. *Lassen*, at 585.

[5] Plaintiffs here are not left without a forum. Although they still may be faced with the argument that there are not adverse interests presented here, the state courts are available.

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1034 September Term, 1971

MARK P. ESSLING, a minor, and EDWARD J. ESSLING, a minor, by JAMES ESSLING, their father and natural guardian,

Appellants,

vs.

RICHARD L. BRUBACHER, Commissioner of Administration of Minnesota,

Appellee.

Appeal From the United States District Court for the District of Minnesota.

This cause came on to be heard on the record from the United States District Court from the District of Minnesota and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the order of November 12, 1971, of the said District Court appealed from in this cause be and is hereby affirmed in accordance with the opinion of this Court this day filed herein.

June 8, 1972.

EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1034

MARK P. ESSLING, a Minor, and EDWARD J. ESSLING, a Minor, by JAMES ESSLING, Their Father and Natural Guardian,

Appellants,

v.

RICHARD L. BRUBACHER, Commissioner of Administration of Minnesota,

Appellee.

Appeal From the United States District Court for the District of Minnesota.

Submitted: May 12, 1972.
Filed: June 8, 1972.

Before Matthes, Chief Judge, Heaney and Stephenson, Circuit Judges.

Per Curiam.

Plaintiffs-appellants are students of the public schools in Minnesota. They filed a complaint in the United States District Court for the District of Minnesota against the Commissioner of Administration of Minnesota, alleging that the defendant in concert with others intended to violate a Federal-State compact by disposing of "School Trust Lands" in Min-

nesota for less than the full value of the land. The complaint sought injunctive relief and a declaration that the "State Park Act," Chapter 852 Minnesota, Laws of 1971, was violative of the "Laws of the United States [and] the Constitution of Minnesota."

In response to a motion to dismiss, Chief Judge Devitt granted the motion and dismissed the action for lack of subject matter jurisdiction. The appeal is from the order of dismissal.

Judge Devitt demonstrated in a soundly reasoned opinion, (unreported) that the complaint did not present a real and substantial federal question. Judge Devitt documented his opinion with controlling authority. We are satisfied that subject matter jurisdiction does not exist in the federal courts and that the cause was properly dismissed.

Our examination of the record and the contentions of appellant convinces us that their fears are more imaginary than real. If and when the land in question is acquired for park purposes, appellants or other individuals having proper standing will certainly be entitled to their day in court in the event the consideration paid for the land does not represent its fair market value.

We affirm on the basis of the District Court's opinion.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

(1)

NORTHWEST ORDINANCE 1787

Act of Congress, July 13, 1787

U. S. Rev. Stats., 2d Ed. 1878 P. 13

An Ordinance for the government of the territory of the United States northwest of the river Ohio.

14. It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as *articles of compact*, between the original States and the people and States in the said territory, and forever remains unalterable, unless by common consent, to wit:

"Art. III. Religion, morality, and knowledge being necessary to good government and the happiness of mankind, *schools and the means of education shall forever be encouraged. . . .*"

(2)

ORGANIC ACT

Act of Congress, March 3, 1849

9 U. S. St. at Large 403

An Act to establish the Territorial Government in Minnesota

"Sec. 18. And be it further enacted, That *when the lands* in the said Territory shall be surveyed under the direction of the government of the United States, Preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, *reserved for the purpose of being applied to schools in said Territory, and in the States and Territories hereafter to be erected out of the same. . . .*"

(3)

ENABLING ACT

Act of Congress, Feb. 26, 1857

11 U. S. S. St. at Large 166

An act to authorize the People of the Territory of Minnesota to form a Constitution and State Government, preparatory to their Admission to the Union on an equal Footing with the original States.

"Sec. 5. And be it further enacted, That *the following propositions be, and the same are hereby offered to the said convention of the people of Minnesota for their free acceptance or rejection, which, if accepted by the convention, shall be obligatory on the United States and upon the said State of Minnesota to wit:*

First. That sections numbered sixteen and thirty-six in every township of public lands in said State, and where either of said sections, or any part thereof, has been disposed of, other lands, equivalent thereto and as contiguous as may be, *shall be granted to said State for use of schools.*

CONSTITUTION OF MINNESOTA

Article 2

Section 3

3. Acceptance of propositions in enabling act

Sec. 3. *The propositions contained in the act of Congress entitled,* "An act to authorize the people of the Territory of Minnesota to form a constitution and state government, preparatory to their admission into the Union on equal footing with the original states," *are hereby accepted, ratified and confirmed, and shall remain*

irrevocable without the consent of the United States; and it is hereby ordained that this State shall never interfere with the primary disposal of the soil within the same, by the United States, or with any regulations Congress may find necessary for securing the title to said soil to bona fide purchasers thereof; and no tax shall be imposed on lands belonging to the United States and in no case shall non-resident proprietors be taxed higher than residents.

CONSTITUTION OF MINNESOTA

Article VIII

Sections 1 and 2

1. Uniform system of public schools

Sec. 1. The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature *to establish a general and uniform system of public schools.*

2. Proceeds of school lands to be a perpetual fund

Sec. 2. The proceeds of *such lands as are or hereafter may be granted by the United States for the use of schools* within each township of this State shall remain a perpetual school fund to the State; and not more than one-third (1/3) of said lands may be sold in two (2) years, one-third (1/3) in five (5) years and one-third (1/3) in ten (10) years; but the lands of the greatest valuation shall be sold first; provided, *that no portion of said lands shall be sold otherwise than at public sale. The principal of all funds arising from sales or other disposition of lands or other property, granted or entrusted to this State in each township for educational purposes, shall forever be preserved inviolate and undiminished;* and the income

arising from the lease or sale of said school land shall be distributed to the different townships throughout the State; in proportion to the number of scholars in each township, between the ages of five and twenty-one years; and shall be faithfully applied to the specific objects of the original grants or appropriations.

Act of Congress of May 11, 1858
11 U. S. Stat. at Large 285

ACT OF ADMISSION INTO THE UNION

WHEREAS, An act of Congress was passed February twenty-sixth, eighteen hundred and fifty-seven, entitled "An act to authorize the people of the Territory of Minnesota to form a constitution and state government preparatory to their admission into the Union on an equal footing with the original states"; and, whereas, the people of said Territory did, on the twenty-ninth day of August, eighteen hundred and fifty-seven, by delegates elected for that purpose, form for themselves a constitution and state government, which is republican in form, and was ratified and adopted by the people at an election held on the thirteenth day of October, eighteen hundred and fifty-seven, for that purpose; therefore,

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the State of Minnesota shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original states in all respects whatever.

Publ. L. No. 71-661, Sec. 101 (Jan. 8, 1971)

. . . the Secretary shall not establish the park until the lands owned by the State of Minnesota and any of its political subdivisions within the boundaries shall have been donated for the purposes of the park . . .

Chap. 852, Minn. Sess. Law Serv. (1971)

Sec. 3 . . .

Subd. 2. [TRUST FUND LAND; CONDEMNATION] For the purpose of satisfying the public sale requirements of the Minnesota Constitution, Article 8, Section 4, and other applicable provisions of Minnesota's Constitution, including but not limited to Article 4, Section 32, and in keeping with the decision of the Minnesota Supreme Court in the case of Independent School District of Virginia v. State, 124 Minn. 271, where the court held that condemnation satisfied the public sale requirement of the Minnesota Constitution, the Commissioner of Administration shall acquire by condemnation, fee title to all trust fund lands lying within the boundaries of Voyageurs National Park . . . Before any parcel of trust land is donated to the United States, the Commissioner of Administration shall certify to the governor that the parcel has been condemned, the condemnation award has been paid, and the time to appeal has expired.

Chap. 852, Minn. Sess. Law Serv. (1971)

Sec. 9 [LIMITATION ON APPROPRIATIONS] It is the intent of the legislature that the appropriations made by . . . Section 8, as proceeds from the sale of Voyageurs National Park Bonds, shall not exceed

$6,000,000.00 and shall constitute the total expenditure of the state or any state agency for the purposes of this act, notwithstanding any other provisions of law or any appropriations made by law.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

MARK P. ESSLING, a minor, and EDWARD J. ESSLING, a minor, by JAMES ESSLING, their father and natural guardian,

Plaintiffs,

vs.

RICHARD L. BRUBACHER, Commissioner of Administration of Minnesota,

Defendant.

COMPLAINT
Civil Action No. 3-71-201

Plaintiffs allege:

I. *JURISDICTION*

(a) This action arises under the Laws of the United States as hereinafter more fully appears;

1) The Act of Congress of July 13, 1787, U.S. Rev. Stat. 2nd Ed. 1878, p. 13, Art. III;

2) The Act of Congress of March 3, 1849, 9 U.S. Stat. at Large 403, Sec. 18;

3) The Act of Congress of February 26, 1857, 11 U.S. Stat. at Large 166, Sec. 5;

4) The Act of Congress of May 11, 1858, 11 U.S. Stat. at Large 285;

5) The Act of Congress of January 8, 1971, P. L. 9-661, 84 Stat. 1970,

and all laws supplementary and amendatory thereof.

(b) The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

II. *PARTIES*

(a) *Plaintiffs*

1) Plaintiff, Mark P. Essling, is a minor, eleven years of age. Plaintiff, Edward J. Essling, is a minor, nine years of age.

2) That both of said plaintiffs are citizens and residents of the United States and of the State of Minnesota, residing at 1241 Jefferson Avenue, St. Paul, Minnesota 55105.

3) That both of said plaintiffs bring this action by James M. Essling, their father and natural guardian.

4) That both of said plaintiffs are students of the public schools of Minnesota and attend the Randolph Heights Public Elementary School, Independent School District No. 625, of St. Paul, Minnesota. They bring this action in their own behalf and on behalf of more than 930,000 public school children of Minnesota similarly situated.

(b) *Defendant*

The defendant is the Commissioner of Administration of the State of Minnesota.

III. *SCHOOL TRUST LANDS*

(a) That in the counties of St. Louis and Koochiching, Minnesota, within the geographic boundaries described in

Section 102 of the Act of Congress, referred to herein—Paragraph 1 (A) (5), are certain lands known, classified and hereinafter called, "School Trust Lands" comprising approximately 46,000 acres.

(b) That said "School Trust Lands" include and border upon numerous lakes and streams, have more than 160 miles of water and lakeshore frontage of a value in excess of 20 million dollars.

That said "School Trust Lands" contain forests which embrace numerous stands of virgin timber capable of scientific growth, management and selective harvesting, all of great value.

That said "School Trust Lands" are located within and adjacent to geologic areas of vast mineral resources and are known to contain deposits of iron ore, copper, nickel and other minerals all of great and yet unmeasured value.

(c) That said "School Trust Lands" with the appurtenant lakeshore frontage, water, timber and mineral rights are of a fair market value in excess of 100 million dollars.

IV. *TRUST - COMPACT - AGREEMENT*

(a) That in the year 1858, pursuant to an historic policy, the United States granted said "School Trust Lands" to—and the same were accepted by—the State of Minnesota upon terms of trust, compact and agreement. It being provided that said lands were granted and accepted for the use of the schools; that said lands would never be sold except for value at public sale; that the proceeds from such sales be set aside in a perpetual fund to be kept inviolate forever with only the income to be used for the benefit of the school children and apportioned according to their numbers.

(b) That the policy, terms and provisions of said Trust, compact and agreement are contained in the Acts of Congress herein referred to—paragraph I (A) (1), (2), (3) and (4) (see Exhibit A attached), the laws supplementary and amendatory thereof; in the Constitution of Minnesota, Article II, Section 3, Article VIII, Sections (1), (2) and (3) and in the laws and amendments supplementary thereto (see Exhibit B attached).

(c) That through the years past the obligations and duties of said trust, compact and agreement have been faithfully recognized, honored and kept by officials of the United States and the State of Minnesota.

That as a result thereof, the proceeds from the lawful sale and use of said "School Trust Lands" have accumulated in a perpetual trust fund now exceeding 450 million dollars, which together with the lands here concerned are trust assets for the present and future generation of Minnesota's school children.

V. *THE WRONGFUL, ILLEGAL ACTS AND INTENTIONS.*

(a) That the defendant acting as the Commissioner of Administration of Minnesota and pursuant to a plan, scheme and device under color of authority by an Act of the Legislature of Minnesota, Chapter 852, Laws of 1971, June 7, 1971, hereinafter called "State Park Act", in concert with others including various officials of the State, threatens, intends, plans and is preparing to acquire, change and affect the title, classification, use and possession of the said "School Trust Lands" all for the purpose of effecting a donation and gift of the same for a proposed national park without payment of value or reimbursement in full therefor to the said perpetual trust fund of Minnesota's school children.

(b) That the defendant, and others with whom he acts and plans, pretend and assert authority to so acquire and possess the "School Trust Lands" through the power of eminent domain by reason of certain provisions of said "State Park Act" (Sections 8 and 9 thereof purport to appropriate and designate only a specified and limited fund therefor).

That said "State Park Act" does not provide adequate or just compensation for any acquisition of "School Trust Lands" and makes no provision for payment of compensation in excess of such limited amount therein specified.

(c) That defendant, among other things, pursuant to said plan, scheme and device, pretends and asserts that by virtue of the terms of said "State Park Act", the water and mineral rights appurtenant to the "School Trust Lands" will be reserved to the State of Minnesota in trust for its schools. That in fact the defendant's said plan, scheme and device and the said "State Park Act" specify, intend and provide to the contrary so that these water and mineral rights if reserved will be so only under a perpetual covenant that they never be used.

(d) That the said acts and intended acts of the defendant and the said "State Park Act" are illegal and unlawful, violate the laws of the United States, the Constitution of Minnesota, and constitute an unlawful breach and dishonor of the letter and spirit of the said trust, compact and agreement between the United States and the people of Minnesota; they damage, depreciate, dissipate and injure the assets and rights of the beneficiary school children of Minnesota.

WHEREFORE, plaintiffs pray judgment:

1. Declaring and adjudging that the acts and intended acts of the defendant to acquire and effect the said donation and

gift of the "School Trust Lands" of Minnesota are unlawful and illegal and are in violation of the laws of the United States, the Constitution of Minnesota and constitute an unlawful breach of the trust, compact and agreement between the United States, the people and government of Minnesota.

2. Declaring and adjudging that the said "State Park Act" as referred to herein is illegal, unlawful, in violation of the laws of the United States, the Constitution of Minnesota, and is unlawful and a violation of the said trust, compact and agreement between the United States, the people and government of Minnesota.

3. Forever enjoining and restraining the defendant from acquiring or attempting to acquire the said "School Trust Lands" or aiding or abetting the donation or gift of the same pursuant to said alleged plan, scheme and device or under and pursuant to any provision of said "State Park Act".

4. For costs and disbursements herein.

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In the
Supreme Court of the United States

October Term, 1972

No. 72-367

MARK P. ESSLING, a minor, and EDWARD J. ESSLING, a minor, by JAMES ESSLING, their father and natural guardian,

Petitioner,

vs.

RICHARD L. BRUBACHER, Commissioner of Administration of Minnesota,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

Petitioner's citations to the appendix of the opinions in the courts below are listed in reverse order. The opinion of the Court of Appeals for the Eighth Circuit is found at pages 6 and 7 of the appendix. The opinion of the District Court for the District of Minnesota is found at pages 2, 3 and 4 of the appendix.

STATUTORY PROVISIONS INVOLVED

1. VOYAGEURS NATIONAL PARK, MINNESOTA STATUTES, CHAPTER 84B (1971).

In addition to the statutory provisions listed in the petition, the following provisions of the Minnesota statute relating to Voyageurs National Park are involved:

> "[T]he governor . . . shall donate and convey to the United States of America the state's interest in all of the following lands lying within the boundaries of Voyageurs National Park . . .: (1) trust fund lands; (2) lands forfeited to the state for nonpayment of taxes . . .; and (3) other lands acquired or otherwise owned by the state." Minn. Stat. §84B.03(1) (1971).

> "[T]he commissioner of administration shall acquire, by condemnation, fee title to all trust fund lands lying within the boundaries of Voyageurs National Park. . . . Before any parcel of trust fund land is donated to the United States, the commissioner of administration shall certify to the governor that the parcel has been condemned, the condemnation award has been paid, and the time to appeal from the award has expired." Minn. Stat. §84B.03(2) (1971).

> "The commissioner of administration shall also acquire fee title, free from any trust or other encumbrance, to all land lying within the boundaries of Voyageurs National Park, the title to which has vested . . . in the state due to nonpayment of taxes . . . and is held by the state . . . in trust for the respective taxing districts. . . . The commissioner of administration . . . shall appraise the land at its fair market value. Upon determining the value of the land, the commissioner of administration shall transfer to the appropriate county auditor . . . an amount of money equal to the appraised value of the land. . . ." Minn. Stat. §84B.03(3) (1971).

"The commissioner of administration shall acquire, by condemnation or purchase, fee title to lands owned by any political subdivision of the state located within the boundaries of Voyageurs National Park." Minn. Stat. §84B.04 (1971).

"When a tract or lot of privately owned property is acquired by the federal government for inclusion within Voyageurs National Park, and when as a result of the acquisition, taxes are no longer assessed against the tract or lot or any improvements thereon, the following amount is annually appropriated from the general fund to the county of Koochiching or St. Louis for distribution to the taxing districts. . . ." Minn. Stat. §84B.07 (1971).

"For the purposes of providing funds to pay the cost of acquisition of public land in the manner and upon the conditions set forth in sections 84B.03, subdivisions 2 and 3, and 84B.04, including but not limited to the cost of appraisals, court costs, and legal services, the state auditor is authorized . . . to sell and issue bonds of the state . . . in an aggregate amount not to exceed $5,870,000. . . . The proceeds of such bonds . . . are appropriated to the commissioner of administration and shall be . . . used solely for the purpose . . . provided in this section." Minn. Stat. §84 B.08(1) (1971).

"All expenses incidental to the sale, printing, execution, and delivery of bonds pursuant to this section, including but not limited to actual and necessary travel and subsistence expenses of state officer and employees for such purposes, shall be paid from the proceeds of the bonds, and the amounts necessary therefor are appropriated for that purpose." Minn. Stat. §84B.08(3) (1971).

"It is the intent of the legislature that the appropriations made by section 84B.07, as payments to the counties in lieu of taxes, and by section 84B.08, as proceeds from the sale of Voyageurs National Park bonds, shall not exceed $6,000,000 and shall constitute the total expenditures of the state or any state agency for the purposes of sections 84B.01 to 84B.10, notwithstanding any other provisions of law or any appropriation made by law." Minn. Stat. §84B.09 (1971).

2. ADMINISTRATIVE CONTROL OF STATE LANDS, MINNESOTA STATUTES, SECTION 84.027, SUBDIVISION 2 (1971).

The following Minnesota statute relating to administrative control of state lands is also involved:

"The commissioner [of natural resources] shall have charge and control of all the public lands . . . of the state and of the use, sale, leasing, or other disposition thereof . . ." Minn. Stat. §84.027(2) (1971).

3. EMINENT DOMAIN, MINNESOTA STATUTES, CHAPTER 117 (1971).

The following statutory provisions, relating to Minnesota eminent domain (condemnation) proceedings, are also involved:

"All bodies, public or private, who have the right of eminent domain, when exercising such right, shall do so in the manner prescribed by chapter 117, even though a different procedure may be provided by charter provisions, ordinance or statute. . . ." Minn. Stat. §117.011 (1971).

"If such property be required for any authorized

purpose of the state, the proceeding shall be taken in the name of the state by the attorney general upon request of the officer, board, or other body charged by law with the execution of such purpose. . . ." Minn. Stat. §117.035 (1971).

"If the state be an owner, the notice [of hearing on eminent domain petition] shall be served upon the attorney general. . . ." Minn. Stat. §117.055 (1971).

"If the proposed taking shall appear to be necessary and such as is authorized by law, the court by an order shall appoint three disinterested commissioners, and at least two alternates, residents of the county, to ascertain and report the amount of damages that will be sustained by the several owners on account of such taking. . . ." Minn. Stat. §117.075 (1971).

"Without unreasonable delay they shall make a separate assessment and award of the damages which in their judgment will result to each of the owners of the land by reason of such taking and report the same to the court. . . ." Minn. Stat. §117.085 (1971).

"At any time within 40 days from the date that the report has been filed, any party to the proceedings may appeal to the district court from any award of damages embraced in the report, or from any omission to award damages. . . ." Minn. Stat. §117.145 (1971).

"All damages allowed under this chapter, whether by the commissioners or upon appeal, shall bear interest from the time of the filing of the commissioner's report or from the date of the petitioner's possession whichever occurs first. If the award is not paid within 70 days after such filing, or, in case of an appeal within 45 days after final judgment, or within 45 days after a stipulation of settlement, the

court, on motion of the owner of the land, shall vacate the award and dismiss the proceedings as against such land. . . ." Minn. Stat. §117.195 (1971).

QUESTION PRESENTED

Does the complaint present a real and substantial federal question by alleging that the defendant intends to violate a federal-state compact by disposing of lands without paying full value therefor, where the applicable state constitutional provisions and statutes expressly require determination of the land value and full payment thereof?

STATEMENT OF THE CASE

The Statement of the Case set forth in the petition is inaccurate in several respects.

1. CONDEMNATION PROCEEDINGS DETERMINE LAND VALUE.

Contrary to the statement at page 5 of the petition, the Minnesota statute relating to Voyageurs National Park (Minn. Stat. §§84B.01-.10 (1971) does *not* predetermine the outcome of the proceedings to condemn the school trust lands and does *not* fix a "specified and absolute dollar limitation on the amount to be paid to the School Trust Fund for the trust lands." The act merely appropriates certain funds for payments to counties in lieu of taxes (§84B.07), for payment to the school trust fund for the value of the trust lands (§§84B.03(2), 84B.08(1)), for payment to the taxing districts for the value of the tax forfeited lands (§§84B.03(3), 84B.08(1)), for payment to political subdivisions for the value of lands owned by them (§§84B.04, 84B.08(1)), for costs of land acquisi-

tion including appraisals, court costs and legal services (§84B.08(1)), and for costs incidental to the sale of the bonds (§84B.08(3)). The act then (§84B.09) states the "intent" of the legislature that the total appropriation for all these purposes shall not exceed $6,000,000.

The determination of the amount to be paid for the school trust lands is governed by the provisions of the statutes relating to eminent domain proceedings. Minn. Stat. §§117.011, 117.075, 117.085, 117.145 (1971). If the value of the lands as determined in those proceedings is not paid within the specified time, the proceedings must be dismissed and title to the lands is not acquired. Minn. Stat. §117.195 (1971).

2. PARTIES TO CONDEMNATION PROCEEDING ARE SPECIFIED.

The implication in the petition at page 5 that the parties to the condemnation proceedings are uncertain is erroneous. The school trust lands are under the administrative control of the commissioner of natural resources. Minn. Stat. §84.027(2) (1971). The eminent domain statutes specify that the proceedings shall be taken in the name of the state by the attorney general upon request of the officer charged with responsibility for the land acquisition, in this case the commissioner of administration. Minn. Stat. §§84B.03(2), 117.035 (1971). When the state is the owner of the lands involved, notice of the proceeding must be served on the attorney general who, in this case, must then provide representation for the commissioner of natural resources. Minn. Stat. §117.055 (1971).

3. ERRONEOUS CONCLUSIONS NOT ADMITTED BY MOTION TO DISMISS.

The statement in the petition at page 6 that the defendant, by his motion to dismiss, admits the allegations of the plaintiff is inaccurate to the extent that the allegations include conclusions of law and unwarranted deductions of fact. Plaintiff's contention that the full value of the lands involved will not be paid to the trust fund is contrary to the express provisions of the applicable statutes. Minn. Stat. §§117.085, 117.195 (1971). That allegation is not admitted for purposes of the motion to dismiss.

4. COURTS BELOW HELD NO SUBSTANTIAL FEDERAL QUESTION INVOLVED.

The United States District Court for the District of Minnesota granted defendant's motion to dismiss for lack of subject matter jurisdiction on the ground that plaintiff had failed to show existence of a real and substantial federal question constituting an essential element of the cause of action. (A. 3).

On appeal, the United States Court of Appeals for the Eighth Circuit affirmed on the basis of the district court's opinion. (A. 7).

ARGUMENT

1. PETITION IGNORES REQUIREMENT FOR REAL AND SUBSTANTIAL FEDERAL QUESTION.

The reasons relied on for the allowance of the writ of certiorari are 1) that the decision of the court of appeals is in conflict with the decisions of other courts of appeal on the same matters, and 2) that the decision of the court of

appeals is in conflict with applicable decisions of the Supreme Court.

None of the decisions cited in the petition is in conflict with the decision of the court of appeals in this case. Petitioner's argument misinterprets the holding of the court of appeals and ignores the fact that the decisions of the district court and the court of appeals were based on the absence of a "real and substantial" federal question. (A. 3, 7). There are no holdings by the courts below on the significance of the federal-state compact, on federal protection of school land trusts, or on the determination of just compensation in eminent domain proceedings. No holdings on these questions were necessary because it is apparent that the claim set forth in the complaint is without substance.

2. STATE LAW DOES NOT PERMIT DIVERSION OF SCHOOL LANDS.

Petitioner's argument that school lands may not be diverted to other purposes without compensation to the trust fund, and the cases cited in support thereof (Pet. 8, 9), are irrelevant to this case. While the complaint alleges that the school lands involved will be condemned and donated to the United States without payment of their full value to the trust fund, that allegation is not admitted for purposes of the motion to dismiss because it is an erroneous conclusion of law. *Ward v. Hudnell,* 336 F. 2d 247 (5th Cir. 1966); *2A Moore's Federal Practice,* par. 12.08, n. 4. The plain language of the state law conclusively establishes that fee title to the lands cannot be acquired without payment of full value and further conclusively establishes that the land cannot be donated to the United

States until the full value has been paid. The state law requires acquisition of fee title to the lands by condemnation. Minn. Stat. §84B.03(2) (1971). In the condemnation proceedings, commissioners are appointed by the court to determine the value of the lands taken. Minn. Stat. §117.075 (1971). If the condemnation award is not paid within a specified time, the condemnation proceedings must be dismissed on motion of the owner of the lands involved. Minn. Stat. §117.195 (1971). Before any parcel of the land is donated to the United States, the commissioner of administration must "certify to the governor that the parcel has been condemned, the condemnation award has been paid and the time to appeal from the award has expired." Minn. Stat. §84B.03(2) (1971).

3. LAND VALUE IS NOT PREDETERMINED BY THE STATUTE.

Petitioner erroneously asserts that the state law fixes a specific maximum to be paid for the school trust lands. The state law merely appropriates funds for numerous purposes, including payment to the trust fund, and states the intent of the legislature that the total state expenditures for all these purposes shall not exceed a stated amount. Minn. Stat. §§84B.07, 84B.08(1), (3), 84B.09 (1971). Nowhere does the law specify the amount to be paid for the school lands.

In essence, petitioner argues that the state law is invalid because the appropriation of funds is not unlimited and the appropriation may prove inadequate. None of the cases relied upon supports this contention. *Rockaway Pacific Corporation v. Stotesbury*, 225 F. 345 (N.D. N.Y. 1917), (Pet. 10), did not turn on the question of inadequate ap-

propriation. Rather, the court expressly declined to state an opinion as to the value of the lands involved, and stated that the value would be determined in the condemnation proceedings "unaffected in any way by the amount of the sum appropriated by the Legislature". 255 F. at 351. The condemnation statute in that case provided that title to the lands would vest in the state upon completion of certain formalities. The state argued that no appropriation of funds was necessary prior to taking title, and the court held that an appropriation must be made.

Monongahela Navigation Co. v. United States, 148 U. S. 312 (1893), (Pet. 10), merely held that the provision in the statute that certain property rights not be considered in determining value was invalid and must be ignored by the courts in the condemnation proceeding.

Keystone Associates v. Moerdler, 19 N.Y.2d 78, 224 N. E. 2d 700 (1966), (Pet. 10), involved the creation by the legislature of a private corporation vested with power to condemn the Metropolitan Opera House in New York City. The legislation provided for a 180 day delay in the demolition of the building upon deposit of $200,000 as security for damages to the owner. It was intended that the corporation would attempt to raise private funds during this period for the purpose of acquiring the building by condemnation. The court pointed out the doubtfulness of the venture and held that the land owner could not be "relegated to the doubtful responsibility or solvency of a private corporation or an individual". 224 N.E. 2d 700, 703.

State v. McCook, 109 Conn. 621, 147 A. 126 (1929) and *Godfrey v. District Court,* 44 Minn. 299, 46 N.W. 355 (1890), (Pet. 10, 11) both held that adequate condemnation procedures must be established which assure that once

title is taken compensation in full will be made. Neither supports the contention that the mere allegation that the amount of funds appropriated will be inadequate renders the condemnation invalid. In *McCook* it was conceded by all parties that the appropriation exceeded the value of the lands. 147 A. at 129.

Only completion of the condemnation proceedings can determine whether the appropriation is adequate. The condemnation procedure in Minnesota clearly provides full protection for the school trust fund by requiring dismissal of the proceedings if the condemnation award is not paid. Minn. Stat. §117.195 (1971). If the appropriations are inadequate to pay the award, fee title to the lands cannot be acquired and the lands cannot be donated to the United States. Minn. Stat. §84B.03(2) (1971).

4. BARE ALLEGATION OF FEDERAL QUESTION DOES NOT ESTABLISH FEDERAL JURISDICTION.

Jurisdiction of a federal court must be made to appear affirmatively. *Scroggin Farm Corp. v. McFdden,* 165 F. 2d 10 (8th Cir. 1948). Where the jurisdiction is challenged, the plaintiff has the burden of establishing jurisdiction. *Gibbs v. Buck,* 307 U.S. 66 (1939).

It is well settled that the mere averment of the existence of a federal question does not give rise to federal jurisdiction. *Newburyport Water Co. v. Newburyport,* 193 U.S. 561 (1904). The question must be real and substantial, and a genuine controversy must exist. *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 277 (1937). Where the alleged claim is wholly insubstantial and frivolous, the action must be dismissed. *Bell v. Hood,* 327 U.S. 678 (1946).

The bare allegation in the complaint that the lands in-

volved will be acquired and donated to the United States without payment of full value is patently without substance and forms no basis for federal jurisdiction.

In addition to the existence of a genuine controversy, federal jurisdiction requires a showing of a substantive claim which will be sustained under one construction and defeated under another construction of the Constitution or laws of the United States. *Wheeldin v. Wheeler,* 373 U.S. 647 (1963). The complaint in this case makes out no such claim. There is no showing of any substantive right in petitioner which was created by federal law. The bare allegation that the lands involved were granted for the use of schools and that the action is brought on behalf of school students falls short of alleging any substantive right in the students.

Even if it were assumed that the complaint made out a sufficient allegation of a right in the students, it is clear that any such right must have arisen under state law rather than federal law. The federal law relied upon merely grants the lands to the state "for the use of schools." *11 U.S. Stat.* 166 (1857), (A. 9). This limitation on the use of the lands was fully satisfied by the provisions of the Minnesota Constitution applying the proceeds of the lands to school purposes. *Minn. Const.* art. 8, §2 (1857), (A. 10).

Any rights as to the use of the lands clearly arise under the state constitution and laws, and such rights would be identical even in the absence of the federal law which prompted adoption of the state constitutional provision. Any question of federal law in this case is merely incidental, is not an integral part or essential element of the case, and does not supply the basis for jurisdiction of

a federal court. *Shulthis v. McDougal,* 225 U.S. 561 (1912); *Stanturf v. Sipes,* 335 F. 2d 224 (8th Cir. 1964), *cert. denied,* 379 U.S. 977 (1965).

5. PETITIONER'S AUTHORITIES DISTINGUISHED.

Petitioner relies on *Lassen v. Arizona,* 385 U.S. 458 (1967), (Pet. 11). That case was commenced in the Arizona Supreme Court and is not authority on the question of federal jurisdiction. *Lassen* is significant, however, in its approval of the acquisition by one state agency of trust lands administered by another state agency by simply paying the appraised value, despite detailed restrictions in the federal act granting the lands. As in *Lassen,* two state agencies are involved in the acquisition of the lands in Minnesota. The lands are under the jurisdiction of the commissioner of natural resources and are to be acquired by the commissioner of administration. Minn. Stat. §§84.027(2), 84B.03(2) (1971).

None of the other cases relied upon by petitioner provide authority for federal jurisdiction in this case. *Bell v. Hood, supra* (Pet. 7, 11), clearly requires presence of a substantial claim. *Fair v. Kohler Die & Specialty Co.,* 228 U.S. 22 (1913), (Pet. 7, 11), involved a claim under the patent laws which create specific legal rights under federal law. *Smith v. Kansas City Title and Trust,* 225 U.S. 180 (1921), (Pet. 7), involved the constitutionality of a federal statute and makes it clear that the federal claim must be more than merely colorable and must rest on a reasonable foundation. 225 U.S. at 199.

McGoon v. Northern Pacific Railway Co., 204 F. 998 (D.N.D. 1913), (Pet. 7), was a case relating to rights created by the Interstate Commerce Act. The court clearly

pointed out that federal jurisdiction is not established by a showing of only remote or indirect dependence on federal law since such a case does not turn upon a construction of federal law. *Tunstall v. Brotherhood of Locomotive Firemen,* 323 U.S. 210 (1944), (Pet. 11), likewise related to rights under the Interstate Commerce Act. *J. I. Case Company v. Borak,* 377 U.S. 426 (1944), (Pet. 11), related to alleged violations of provisions the Securities Exchange Act which were designed specifically to protect investors. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971), (Pet. 11), involved individual rights protected by the Constitution of the United States.

CONCLUSION

Respondent requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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